Supreme Court, U.S.
FILED

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No. 05-

IN THE

Supreme Court of the United States

SCRIPSOLUTIONS,

Petitioner,

v.

EUFAULA DRUGS, INC., individually and on behalf of a class of all persons or entities throughout the United States who are similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Class Action Fairness Act of 2005 (hereinafter, "CAFA"), the addition of a new defendant to a state court action meeting the requirements of the statute after the statute's effective date constitutes the commencement of an action against that defendant affording it the right to remove the action to federal court under the terms of the CAFA statute.

RULES 14.1 AND 29.6 STATEMENT

The Petitioner is ScripSolutions, which is a trade name of BioScrip, Inc. (formerly known as MIM Corporation), a publicly traded corporation. BioScrip, Inc. has no parent corporation, no publicly traded subsidiaries or affiliates. No publicly held corporation owns 10% or more of BioScrip, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-2a) is not reported. The opinion of the district court (App. B, *infra*, 3a-25a) is not reported but is published at 2005 WL 2465746 (M.D. Ala. Oct. 6, 2005).

JURISDICTION

The court of appeals' order was entered on December 27, 2005. Petitioner filed a timely petition for rehearing on January 17, 2006, which was denied on February 27, 2006. (App. C, *infra*, 26a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

The Class Action Fairness Act of 2005 is reproduced at App. D, *infra*, 27a-51a. The removal section of CAFA is codified as 28 U.S.C. § 1332(d). Appeal from CAFA removal and remand decisions is permitted by 28 U.S.C. § 1453(c). Section 9 of CAFA (titled "Effective Date") reads: "The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." The date of enactment of CAFA was February 18, 2005.

STATEMENT AND ARGUMENT

On February 14, 2005, shortly before the February 18, 2005 effective date of CAFA, the Respondent and another Alabama pharmacy, through common counsel, filed fourteen purported nationwide class actions in several Alabama state courts. Each of the actions alleges contract and non-contract claims against pharmacy benefit managers. In this action, the Respondent named a single defendant that is different from Petitioner although with a similar name. That named defendant had no relationship to or dealings with the Petitioner, had a different name, a different address, a different business, and different attorneys from the Petitioner.

On February 28, 2005, the Respondent first filed with the state court clerk a summons addressed to that different defendant at a non-existent address. Respondent attempted a second service on that different defendant on March 17, 2005, at that defendant's counsel's address. After that entity's lawyers questioned the Respondent's service in March 2005, the Respondent purported to "amend" its complaint on April 8, 2005, naming the Petitioner as the defendant for the first time. On April 8, 2005, the Respondent also provided to the state court clerk a summons naming the Petitioner for the first time and specifying its corporate headquarters address in New York. Petitioner's correct name and address actually appeared on the contract between the parties on which the action is based and also were publicly available. There were no communications between Respondent and Petitioner concerning the dispute in the action prior to Petitioner's service of the April 8, 2005 "amended" complaint.

Petitioner timely removed the action to the district court under CAFA. On the Respondent's motion to remand, the Respondent admitted that all elements for removal under CAFA were met, but argued that, under Alabama state rules of civil procedure, the April 8, 2005 "amendment" adding Petitioner as a defendant "related back" to the date the original complaint was filed in the state court. (App. B, *infra*, at 7a.) The district court found CAFA inapplicable and remanded on this basis. (App. B, *infra*, 9a-13a.)

Petitioner timely sought review in the Court of Appeals for the Eleventh Circuit by notice of appeal and petition for appeal under 28 U.S.C. § 1453(c). The Court of Appeals denied the petition. (App. A, *infra*, 1a-2a.) Petitioner timely petitioned for rehearing, which the Court of Appeals denied. (App. C, *infra*, 26a.) It is respectfully submitted that the district court and Court of Appeals applied the wrong legal standard to the undisputed facts.

The original summons and complaint did not bring the Petitioner before the Alabama state court. A judgment entered on the original summons and complaint, whether by default or otherwise, would have bound the different, unrelated entity named in that summons and complaint, but would not have bound the Petitioner. The "amended" complaint dated April 8, 2005, two and a half months after CAFA's the effective date, commenced a "new piece of litigation" and first brought Petitioner before the Alabama state court.

The sole question on this petition is whether that "new piece of litigation" against the Petitioner was commenced before CAFA's effective date. The district court and Court

of Appeals decided the question under Alabama state procedural law rather than under the statute. Petitioner contends that this question must be decided as a matter of uniform federal law and, under federal law, the motion to remand should have been denied. The district court's and Eleventh Circuit's decisions in this case are in conflict with the rulings of the Fifth, Seventh, and Tenth Circuits. They are also in conflict with the language and intent of CAFA.

Access to a federal forum is an important right that Congress afforded to defendants in purported nationwide class actions, such as this one. Through CAFA, Congress advanced the national policy of reigning in abusive nationwide class actions brought in state courts that it also expressed in the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998. CAFA also implements the constitutional guaranty of federal judicial jurisdiction "between citizens of different states." U.S. Constitution, Art. III, § 2. CAFA extends federal jurisdiction to afford a federal forum to class actions that meet its requirements, all of which were found to be present in this case. (App. B, *infra*, 7a.)

I. The Date of "Commencement" under the Federal CAFA Statute Must Be Determined by a Uniform Federal Construction of that Federal Law

The question in this Petition is what Congress meant by the word "commenced" in the CAFA statute. CAFA, Pub. Law. 109-2, § 9 ("The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.") It is a question of federal statutory construction. Petitioner submits that Congress could not

have intended that fifty different states' varying procedural rules would determine the applicability of this unitary federal jurisdictional statute governing access to a federal forum. Congress expressly passed the statute to provide uniform federal jurisdiction over nationwide class actions to remedy the inconsistencies and abuses Congress found in state courts' treatment of nationwide class actions. S. Rep. No. 109-14, at 5-7.

The term "commenced" is susceptible of a common, uniform meaning. There can be no uniform treatment if the different laws of fifty states govern when a case is commenced for CAFA purposes. The Seventh Circuit agreed. In *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805 (7th Cir. 2005) ("*Knudsen I*"), the Seventh Circuit held that, for purposes of CAFA, "commencement" occurs upon filing by applying Federal Rule of Civil Procedure 3 rather than the Illinois rule of civil procedure governing commencement. *Id.* at 806.

Under Federal Rule of Civil Procedure 3, "[a] civil action is commenced by filing a complaint with the court." It is key, however, that the complaint name the proper defendant or no case is commenced against that defendant. As the Senate Report on the CAFA Bill explained, when the "plaintiff subsequently amends the pleadings in such a way that removal becomes proper, then the notice of removal must be filed within 30 days of receipt by the defendant of 'a copy of the amended pleading . . . from which it may first be ascertained that the case [is removable]'". S. Rep. No. 109-14, at 9. That is exactly what happened here. On the undisputed facts of this case, the Respondent did not commence this action against the Petitioner within the plain

and simple meaning of the statute and the intent of Congress until April 8, 2005, after CAFA's effective date.

The Fifth Circuit reached the same conclusion in *Braud v. Transport Service Co.*, 445 F.3d 801 (5th Cir. 2006). It held that an action is commenced against a defendant for CAFA purposes when the defendant is brought into the action, *id.* at 805 (citing *United States v. Martinez*, 195 U.S. 469 (1904)), and that the window for removal is opened upon the addition of a new defendant "even absent any discussion of 'relation back,' provided, of course, that the defendant is indeed a 'new' defendant." *Id.* at 806.

Similarly, the Tenth Circuit held that the addition of new defendants after the CAFA effective date to an action commenced before CAFA's effective date opens a new window of removal under CAFA. *Prime Care of Northeast Kansas, LLC v. Humana Ins. Co.*, --- F.3d ----, 2006 WL 1305229 (10th Cir. May 12, 2006). The court reviewed three possible standards. It held that the addition of new defendants opened a new CAFA removal window if the amendment did not "relate back," expressly rejecting the standard applied by the Fifth Circuit in *Braud*. *Id.* at **2-5.

In a subsequent appeal in the *Knudsen* action, the Seventh Circuit reviewed the effect on CAFA removal of the addition of new claims to a pending state court action. The court held that, "as we intimated in *Knudsen I* and *Schorsch*, and now hold, a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act." *Knudsen v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir. 2006) ("*Knudsen II*"); *see also Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005).

The Fifth, Seventh, and Tenth Circuits' decisions *in Braud, Knudsen I, Knudsen II, Schorsch*, and *Prime Care* are in conflict with the district court's and Eleventh Circuit's decision in this case. Moreover, the Fifth Circuit's *Braud* decision is inconsistent with the other Circuits' decisions. The issue of removal under the federal CAFA statute when a new defendant (or new claim) is added will be a recurring question of federal statutory construction that requires uniform analysis and uniform results.

District courts have largely followed the rule, rejected in this case by the district court and Eleventh Circuit, that addition of a new defendant (or claim) is the date of "commencement" of the action for purposes of removal under CAFA. *See, e.g., Adams v. Fed. Materials Co.*, Civ. No. 5:05-90-R, 2005 WL 1862378, at *4 (W.D. Ky. July 28, 2005) ("Plaintiffs' decision to add . . . a defendant presents precisely the situation in which it can and should be said that a new action has 'commenced' for purposes of removal pursuant to the CAFA. This is both a logical extension of pre-existing removal practice and in keeping with the general intent of Congress in passing the CAFA -- that is, extending the privilege of removal to federal district courts to defendants in large class actions on the basis of minimal diversity."); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1314 (E.D. Okla. 2005) (denying remand and noting that "there is a significant body of law that suggests that an amended complaint or petition is tantamount to commencing a new cause of action in certain circumstances").

Another district court has rejected that rule, holding that the addition of a new defendant does not afford that

defendant removal rights under CAFA, and that a civil action can have only one commencement date. *Comes v. Microsoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005). This conflicts with the other decisions cited above and also derogates from Congress' expressed intent. S. Rep. No. 109-14, at 9 (when a "plaintiff subsequently amends the pleadings in such a way that removal becomes proper, then the notice of removal must be filed within 30 days of receipt by the defendant of 'a copy of the amended pleading . . . from which it may first be ascertained that the case [is removable]'".)

Some district courts, like the district court and Eleventh Circuit in this case, have applied state law "relation back" or other procedural rules of the states in which the action was commenced, leaving federal jurisdiction under CAFA subject to the variations and peculiarities of state law. *E.g., Dinkel v. General Motors Corp.*, Civ. No. 05-190-PH, 2005 WL 3006728, at *2 (D. Me. Nov. 9, 2005) (applying Kansas rule requiring service of defendants within ninety days after filing of complaint); *Heaphy v. State Farm Mut. Auto. Ins. Co.*, Civ. No. C05-5404RBL, 2005 WL 1950244, at *5 (W.D. Wash. Aug. 15, 2005) (denying remand and holding that an amendment of a complaint adding new claims and parties commences "a new piece of litigation under CAFA, and does not relate back to the date of [the original complaint] under Rule 15"); *Adams v. Ins. Co. of North America*, Civ. No. 2:05-0527, 2006 WL 897945, at *12 (S.D. W.Va. Mar. 30, 2006) (granting remand and holding that, although new claims may open new CAFA removal window, removal will be denied if the claims "relate back"). There is conflict, inconsistency, and confusion among the lower courts in interpreting "commencement" under CAFA. This

Court should grant a writ of certiorari to resolve these conflicts and inconsistencies and eliminate this confusion.

When a new defendant is added to a case after the CAFA effective date, the lawsuit is commenced as to that defendant on that date. Plainly, there would be no question about the right to remove under CAFA if the Respondent had commenced a separate action against the new defendant and then moved to consolidate it with the pre-CAFA pending lawsuit. Further, to the extent that there is any room to apply "relation back" theories to the addition of a new defendant (as distinguished from a new claim), application of the uniform "relation back" provisions of the Federal Rules of Civil Procedure, rather than inconsistent, different, and varying procedural rules developed by state courts for other purposes, should supply the unitary standard for applying the uniform, federal CAFA statute.

There is no dispute that the Respondent sued a different entity than Petitioner in its February 14, 2005 complaint. There is no dispute that the parties had no communications about the claims in the action or the Respondent's intention to sue until the April 8, 2005 summons and "amended" complaint were served on the Petitioner. There is no dispute that the Petitioner had no dealings with or even knowledge of the entity named in the February 14, 2005 complaint. And there is no dispute that the Respondent had actual knowledge of the Petitioner's correct name and correct address long before February 14, 2005.

Thus, the Respondent's "amendment" added a new party to its lawsuit. It did not merely correct a misspelling. Until the "amended complaint" was filed and served, the Petitioner

was not before the state court. The district court found, however, that the "amendment" "related back" under the Alabama procedural rule to the date when the Respondent filed its original complaint against a different defendant. The Eleventh Circuit agreed in refusing to review the decision.

For the reasons set forth above, the addition of a new defendant commences a new piece of litigation for the narrow purposes of CAFA removal. In CAFA, Congress granted important new federal jurisdictional rights. Those rights are entirely defeated if the party to whom Congress granted those rights may never raise them because of the application of a "relation back" theory that closed the removal window before that party was even brought before the court. Therefore, "relation back" should not apply to newly added defendants in determining whether the action was "commenced" against that defendant for purposes of CAFA.

II. The "Amended" Complaint in this Case Does Not "Relate Back" To the Date of the Original Complaint

Assuming, *arguendo*, that there can be circumstances in which "relation back" should be considered in determining whether an action against a newly added defendant was "commenced" on or after CAFA's effective date, the federal district courts should look to Federal Rules of Civil Procedure, not state procedural law, to supply the governing rule. Here, the lower courts applied Alabama law. Under Federal Rule of Civil Procedure 15, the "amendment" to add Petitioner as a defendant did not "relate back."

Federal Rule of Civil Procedure 15(c) requires for "relation back" that the defendant knew or should have known that, but for a mistake concerning the identity of the party, the action would have been brought against it. (App. E, *infra*, 52a-53a.) It is undisputed that the Respondent never communicated any grievance to the Petitioner before serving its April 8, 2005 "amended" complaint and summons. It is undisputed that the Petitioner had no relationship or connection with the defendant named in and served with the original summons and complaint, or that the two entities had different states of incorporation, different businesses, and different offices, personnel, and attorneys. The Respondent has never claimed that Petitioner knew or should have known that the Respondent had attempted to commence litigation against it before February 18, 2005. The similarities in the names of the two entities does not confer on the Petitioner any knowledge of the suit against the other defendant. *See Brown v. Kerkhoff*, Civ. No. 4:05-0274JEG, 2005 WL 2671529, at *13 n.18 (S.D. Iowa Oct. 19, 2005) (holding that, even if defendants had notice of the action from the Amended Petition, plaintiffs failed to allege that they "knew or should have known" they would have been sued).

The district court found that Respondent's service of its "amended" complaint on the Petitioner within 120 days after February 14, 2005 satisfied the "knew or should have known" requirement under the Alabama rule, which is parallel to the Federal Rule. (App. F, *infra*, at 54a-55a.) However, *subsequent service* cannot satisfy the *prior knowledge* requirement. This is a plain error of both law and logic. The "knew or should have known" requirement under Rule 15 is measured as of the date of the original filing, and

it is independent of the separate requirement of service of the amended complaint within 120 days. Satisfying the "120 days" element did nothing to satisfy the "knew or should have known" element.

In addition, the "relation back" rules require the Respondent to prove an excusable mistake on its part. It did not do so. Its naming of a different defendant instead of the Petitioner may have been a mistake, but it is not an excusable "mistake" as a matter of law. It is undisputed that the parties' contract correctly and legibly identified the Petitioner by name and address, and that the Petitioner's name and address were publicly available. The Respondent has never offered an explanation that might constitute excuse. *See Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004) (lack of knowledge is not excusable mistake for relation back); *King v. One Unknown Federal Correction Officer*, 201 F.3d 910, 914 (7th Cir. 2000) (failure to identify proper party is not excusable mistake for relation back).

Therefore, even if recourse to "relation back" principles under the Federal Rules of Civil Procedure are appropriate in resolving the CAFA "commencement" question, the Respondent did not satisfy the requirements of Rule 15(c) as a matter of law.

The decision of the courts below to apply Alabama procedural law is the wrong choice of law. It is inconceivable that Congress intended for important federal jurisdictional rights of access to a federal forum, which Congress granted in order to curb abusive state court proceedings, should turn on the vagaries of fifty state laws' procedural rules and precedents. It is also improper for

federal courts to interpret federal statutes with reference to fifty states' laws unless there is a clear indication that Congress intended that result, particularly when the Federal Rules of Civil Procedure provide a uniform point of reference.

However, on the undisputed facts of this case, the result of applying Alabama law should be the same as under the Federal Rules. Alabama Rule of Civil Procedure 15(c) is substantively the same as Federal Rule 15(c), Apps. E, F, *infra*, at 52a, 54a, and the Alabama courts have held that the Alabama Rules should be interpreted consistently with the Federal Rules of Civil Procedure. *Chumney v. United States Repeating Arms Co.*, 196 F.R.D. 419, 428 (M.D. Ala. 2000); *Borders v. City of Huntsville*, 875 So. 2d 1168, 1176 (Ala. 2003). Therefore, whether the courts below analyzed "relation back" under Alabama's Rule 15(c) or Federal Rule 15(c), the requirements of that doctrine were not met and Petitioner's removal of the action to federal court under CAFA should have been sustained.

Having elected to apply Alabama procedural law, the courts below made a further error of law that resulted in remand of the case to state court. Under Alabama law, an action is not deemed "commenced" when the complaint was filed if the plaintiff had no present intention of effecting service at the time of filing the complaint. *Ward v. Saben Appliance Co.*, 391 So. 2d 1030, 1035 (Ala. 1980); *see also Greer v. Skilcraft*, 704 F. Supp. 1570, 1583 (N.D. Ala. 1989). Here, the objective intent of the Respondent was to serve a different company. In addition, it is undisputed that the Respondent did not file a summons addressed to the originally named, different defendant until two weeks after

the complaint, and did not file a summons directed to the Petitioner until April 8, 2005. Both dates are after the CAFA effective date. Therefore, under Alabama law as interpreted by that state's highest court, no civil action was "commenced" against any defendant, and certainly not against the Petitioner, until after CAFA's effective date.

Chief Judge Fuller of the Middle District of Alabama so held in two actions virtually identical on this point to the action before this Court. *Main Drug, Inc. v. Aetna U.S. HealthCare, Inc.*, Civ. No. 2:05-292-F, 2005 WL 3440636 (M.D. Ala. Dec. 14, 2005); *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, Civ. No. 2:05-293-F, 2005 WL 3440635 (M.D. Ala. Dec. 14, 2005). Respondent is the plaintiff in *Eufaula Drugs/TDI*, and both plaintiffs in those actions are represented by the same lawyers who represent Respondent in this action. The complaints, alleging putative nationwide class actions, raise the same claims on virtually identical allegations as the allegations and claims in this action. As here, the plaintiffs in those cases filed their complaints in Alabama state court on February 14, 2005, four days before CAFA's effective date. As here, the plaintiffs did not provide the state court clerk with the necessary summonses for service until February 28, 2005, after CAFA's effective date. Both actions were removed to the Middle District of Alabama under CAFA. Chief Judge Fuller denied remand in both. He held that the lawsuits were not commenced under Alabama procedural law for CAFA purposes until after the CAFA effective date because the plaintiffs had not provided the state court clerks with the necessary summonses for service before February 18, 2005. *Eufaula Drugs/TDI*, 2005 WL 3440635, at **2-3; *Main Drug, Inc.*, 2005 WL 3440636, at **3-4.

Petitioner believes that, under CAFA, the date an action is commenced against a defendant is simply the date when that defendant was first brought before the court, without reference to "relation back" principles. However, if "relation back" principles are to be considered, the uniform Federal Rules of Civil Procedure should provide the basis for decision, not the peculiarities of fifty states' rules and decisions. Yet, in this case, the result is the same under any approach, and remand of this action to state court was plain legal error.

Thus, the Petitioner was not named in any pleading filed with the state court until April 8, 2005, after the CAFA effective date; under CAFA, therefore, no action was commenced against the Petitioner until CAFA was effective. Second, if the lower courts must look beyond the statute to interpret when an action is commenced, the Federal Rules of Civil Procedure provide the logical referent law; under the Federal Rules, this action was not commenced against the Petitioner until April 8, 2005 since "relation back" under Federal Rule 15(c) does not apply. Third, if lower courts may refer to state procedural laws to determine "commencement" for purposes of CAFA removal, Alabama law compelled the conclusion that this action was not commenced against the Petitioner until February 28 or April 8, 2005, both after CAFA's effective date. The lower courts committed plain legal error on an undisputed factual record and deprived Petitioner of its access to the federal forum that Congress granted by enacting CAFA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 27, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15668-AA

EUFAULA DRUGS, INC., individually and on behalf of a class of all persons or entities throughout the United States who are similarly situated.

Plaintiff-Appellee,

versus

SCRIPSOLUTIONS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

BEFORE: ANDERSON, BIRCH and WILSON, Circuit Judges.

BY THE COURT:

Appellant asks this Court to review the District Court's determination that Appellee's Amended and Restated Complaint related back to the filing of the original Complaint on February 14, 2005, and thus, that the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453(c), did not apply since that

Act did not become effective until February 18, 2005 and is not retroactive. *See* Pub. Law 109-2, § 9, 119 Stat. 4 (2005). Based in part on that determination, the District Court granted Appellee's motion for remand back to state court.

28 U.S.C. § 1447(d) bars this Court's review of the District Court's Order unless the CAFA applies. *See* 28 U.S.C. § 1453(c)(1)("Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed . . .")

Upon review, the Court DENIES permission to appeal as requested by Appellant, as Appellant has not demonstrated that the District Court's findings of fact are clearly erroneous and Appellant has presented no meritorious claim of legal error in the District Court's application of the relation-back doctrine.

Consequently, the Court DENIES Appellant's request for review and DISMISSES this matter. All remaining motions are DENIED AS MOOT. The Clerk is directed to close this case.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION FILED OCTOBER 6, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

(WO)

CIVIL ACTION NO. 2:05cv370-A

EUFAULA DRUGS, INC.,

Plaintiff,

v.

SCRIPSOLUTIONS,

Defendant.

MEMORANDUM OPINION

I. INTRODUCTION

This cause is before the court on a Motion to Remand, filed by the Plaintiff, Eufaula Drugs, Inc. (Doc. # 9).

The Plaintiff originally filed a Complaint and an Amended and Restated Complaint in this case in the Circuit Court of Barbour County, Alabama, Eufaula Division, bringing claims for misrepresentation/suppression, breach of

contract, unjust enrichment/constructive trust, conspiracy, and injunctive relief. The Defendant removed the case stating that federal subject matter jurisdiction exists under the Class Action Fairness Act, 28 U.S.C. § 1332(d) and that diversity subject matter jurisdiction exists in this case.

For reasons to be discussed, the Motion to Remand is due to be GRANTED.

II. MOTION TO REMAND STANDARD

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (1994); *Wymbs v. Republican State Executive Committee*, 719 F.2d 1072, 1076 (11th Cir.1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1600, 80 L.Ed.2d 131 (1984). As such, federal courts only have the power to hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen*, 511 U.S. at 377. Because federal court jurisdiction is limited, the Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear. *See Burns*, 31 F.3d at 1095.

Appendix B

III. FACTS

The facts relevant to the pending Motion to Remand are as follows:

The Plaintiff, Eufaula Drugs, Inc., ("Eufaula Drugs"), originally filed a complaint in the Circuit Court of Barbour County, Alabama (Eufaula Division) on February 14, 2005 against "ScriptSolutions" and various fictitious parties. Eufaula Drugs filed an Amended and Restated Complaint on April 8, 2005, bringing claims against "ScripSolutions," and fictitious defendants.

Eufaula Drugs alleges in the Amended Complaint that it is an independently owned pharmacy and that ScripSolutions is a pharmacy benefit management company. Eufaula Drugs states that it entered into an agreement whereby it agreed to dispense prescription medication. The contract requires ScripSolutions to reimburse Eufaula Drugs for filling name brand medications at a rate which is determined by using the Average Wholesale Price, or AWP. Eufaula Drugs asserts that ScripSolutions failed to fully reimburse it, and members of the class, using the AWP. Eufaula Drugs seeks to assert claims on behalf of a nationwide class.

ScripSolutions presents evidence as to the total number of brand name prescriptions reimbursed for Eufaula Drugs, and various putative class members.

"ScripSolutions" instead of "ScriptSolutions" and had an alias summons issued listing an address of 100 Clearbrook Drive in Elmsford, New York. Service by certified mail was had at that address. Other than the substitution of ScripSolutions for ScriptSolutions in the style of the Amended and Restated Complaint, and the correction of the Defendant's address in paragraph 6, the two Complaints are substantially identical.

The court gave the parties additional time in which to submit evidence on the point of whether there are two separate corporate entities by those names. ScripSolutions has presented evidence that the corporations are separate and unrelated. Script Solutions, Inc. is a New York State corporation with its principal place of business in Queens County, New York. ScripSolutions is a Delaware corporation with its headquarters in Westchester County, New York and a business office in Rhode Island. Colucci Declaration at ¶¶ 2, 6.

The court also gave the parties additional time in which to file supplemental briefs discussing *Knudsen v. Liberty Mutual Insurance Company*, 411 F.3d 805 (7th Cir.2005). While factually distinct from this case, the reasoning of the *Knudsen* case is helpful in the analysis of this case. In *Knudsen*, a defendant attempted to remove a case under the CAFA by arguing that the plaintiffs' redefinition of the class commenced a new action for purposes of CAFA application. The court rejected this argument. The court reasoned that any act, short of filing a new lawsuit, to be considered a "commencement" of the action must be significant enough to constitute a "restart" which would enable the defendant to assert the statute of limitations. *Id.* at 806. In dicta the

Knudsen court stated that if a defendant were added which had not previously been in the suit, it would have the right to remove under CAFA because "suit **against it** would have been commenced after February 18, 2005." *Id.* at 808 (emphasis in original).

Under the analysis in *Knudsen*, commencement of an action can be particular to a defendant and is not based solely on when the complaint is filed. The court agrees with this analysis. Although this is the argument advanced by ScripSolutions in this case, this court does not find that that broad proposition answers the inquiry. Under the *Knudsen* case, in determining whether an act short of filing the complaint is sufficient to constitute commencement, the act taken with respect to a particular defendant should have the effect of establishing a date for statute of limitations purposes. Such an inquiry requires application of "relation back" principles. *See Senterfett v. SunTrust Mortgage, Inc.*, No. CV 105-059, 2005 WL 2100594 at *2 (S.D.Ga. Aug.31, 2005) (relying on *Knudsen* and applying relation back principles to determine whether there was a sufficient step to commence a new case against a defendant).

Although the *Knudsen* court referred, in dicta, to the statute of limitations and the operation of relation back in its discussion, it did not engage in any analysis relevant to those issues because those issues were not before it. Because the situation which had not yet been presented in *Knudsen* is now before this court, this court must engage in the relevant analysis of relation back of the Amended and Restated Complaint. If the Amended and Restated Complaint relates back to the filing of the original Complaint, for statute of

limitations purposes, the CAFA does not apply; if it does not relate back, the CAFA applies.

Eufaula Drugs argues that the Amended Complaint relates back pursuant to Alabama Rule of Civil Procedure 15(c)(3), so no new action was commenced as to ScripSolutions on the date it amended its Complaint.

Under Alabama Rule of Civil Procedure 15(c):[3]

> An amendment of a pleading relates back to the date of the original pleading when
>
> * * *
>
> (2) the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . , or
>
> (3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is

3. The court notes that another district court decision which has analyzed relation back principles in applying the CAFA used the federal rule of civil procedure. *See Senterfett v. SunTrust Mortgage, Inc., No. CV 105-059, 2005 WL 2100594 (S.D.Ga. Aug.31, 2005).* Because the relevant portion of the federal rule and the Alabama rule are the same, this court would also find that the Amended and Restated Complaint in this case relates back under the federal rule.

> satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

ScripSolutions argues that there is no relation back because there was no way that it should have known that but for a mistake concerning the identity of the party, the action would have been brought against it.

It appears to the court that the Amended and Restated Complaint would relate back under Alabama Rule of Civil Procedure 15(c)(3) because ScripSolutions was on notice within 120 days of the filing of the original Complaint that but for the mistake in naming ScripSolutions, it would have been named in the Complaint. ScripSolutions was served with a copy of the Amended and Restated Complaint which, when compared to the original Complaint, reveals that in it Eufaula Drugs no longer pursued any claim against "ScriptSolutions," but only restated the complaint to bring the same allegations against "ScripSolutions." It is clear from the comparison of the complaints that the allegations remained the same, and that one Defendant was substituted for another. In addition, ScripSolutions had in its records its agreement with Eufaula Drugs, such as was alleged in the Amended and Restated

Complaint, and also was put on notice within 120 days of the filing of the original Complaint, by the reply brief filed on June 14, 2005 in response to the Motion to Remand, that Eufaula Drugs had intended to sue ScripSolutions and named "ScriptSolutions" in the original Complaint through error. Furthermore, this notice was such that ScripSolutions "will not be prejudiced in maintaining a defense on the merits" as required by the rule.

ScripSolutions also argues that the case was not commenced as to it until after the effective date of the CAFA because a lawsuit is not commenced upon the there filing of a complaint. Instead, there must be a bona fide intent to proceed with the action at that time. *See Pettibone Crane Co. v. Foster*, 485 So.2d 712, 714 (Ala.1986). Eufaula Drugs argues that the rule in the *Pettibone Crane Co.* decision is only relevant in analyzing when an action is commenced for purposes of the statute of limitations. Because, under the rationale used by the *Knudson* court, with which this court agrees, commencement for purposes of statute of limitations is used in determining commencement under the CAFA, the court finds the *Pettibone Crane Co.* decision helpful in its analysis.

Under Alabama law, a complaint is commenced for purposes of the statute of limitations when it is filed with the intention of having process served in due course. *Pettibone*, 485 So.2d at 713. Filing a complaint without instructions for service is not sufficient to commence a case for purposes of the statute of limitations. *Id.* at 714.

Under the facts of this case, wherein Eufaula Drugs timely provided information which allowed the defendant

named in the original complaint to be served, then provided information to allow for the issuance an alias summons, then filed an Amended and Restated Complaint with which the correct Defendant was served, the court concludes that suit was filed with the intention of having process served in due course. The mere fact, pointed to by ScripSolutions, that other similar lawsuits have been filed which include this Plaintiff does not undermine this conclusion. Accordingly, this case was commenced for purposes of the CAFA before the effective date of the CAFA, and there is no subject matter jurisdiction under the CAFA.

B. Subject Matter Jurisdiction under 28 U.S.C. § 1332(a)

ScripSolutions argues that this court has subject matter jurisdiction because the traditional diversity statute is satisfied in this case. There is no issue as to diversity of citizenship. Therefore, the only issue with respect to the applicability of the diversity statute is existence of the requisite amount in controversy.

Eufaula Drugs has sought compensatory and punitive damages as well as injunctive relief on behalf of itself and each class member, but states in the Amended and Restated Complaint that the amount sought by each class member does not exceed $74,500.

Where a plaintiff specifically claims less than the requisite jurisdictional amount, a defendant must prove to a "legal certainty" that the plaintiff's claims would not yield a recovery less than the jurisdictional amount. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir.1994). This

under *Burns*, the court accepts Eufaula Drugs' representation, through its attorney, that the amount in controversy is $74,500, or less, per plaintiff. The burden, therefore, is placed on ScripSolutions to prove to a legal certainty that the amount sought is more than $75,000 for at least one plaintiff.

ScripSolutions apparently has not attempted to demonstrate to a legal certainty that Eufaula Drugs has suffered damages in an amount in excess of the jurisdictional amount. ScripSolutions instead focuses on unnamed plaintiffs. ScripSolutions provides evidence of the total amount of reimbursement of name brand prescriptions for Walgreens, CVS, and WalMart during the class period. *See* Declaration of John Colucci.[5]

There is a question in the relevant case law as to whether it is sufficient that an unnamed class member meets the jurisdictional amount, in the exercise of supplemental jurisdiction over the remainder of the class. As this court has noted in an earlier case, the Eleventh Circuit has previously remanded a case for the district court to determine whether any member of the class met the jurisdictional amount. *See Chapman Funeral Home, Inc. v. Nat'l Linen Serv.*, 178 F.Supp.2d 1247, 1250 (M.D.Ala.2002) (citing *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1273 (11th Cir.2000)).[6] After the Eleventh

5. According to ScripSolutions' evidence, of the three identified class members, Walgreens had the highest number of brand name prescriptions reimbursed by ScripSolutions during the class period.

6. Eufaula Drugs states that *Morrison* is in conflict with an earlier panel opinion, but that opinion stated that "one individual plaintiff" had to meet the jurisdictional amount, and it is unclear whether the opinion intended to specify that the plaintiff had to be a named plaintiff. *See Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 756 (11th Cir.2000).

Circuit's ruling in *Morrison*, and this court's decision in *Chapman*, however, the Supreme Court held that

> where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.

Exxon Mobil Corp. v. Allapattah Services, Inc., __ U.S. __ __, 125 S.Ct. 2611, 2615, 162 L.Ed.2d 502 (2005).

This court only need decide whether the Supreme Court's holding precludes reliance on an unnamed class members' ability to meet the jurisdictional amount, however, if ScripSolutions has met its burden of establishing to a legal certainty that there are class members for which the amount in controversy exceeds the jurisdictional amount.

As stated above, ScripSolutions has submitted evidence of the total reimbursement of three pharmacies during the class period. Although not in any evidence, in its Notice of Removal, ScripSolutions states that one of the pharmacies, Walgreens, was reimbursed $50 million for 570,000 brand name drug prescriptions in 2004. ScripSolutions states that, if Walgreens was under-reimbursed by only 2 cents per name brand prescription, over the six years of the class period, the amount of damages sustained by Walgreens would be

$125,000 and would exceed the jurisdictional amount. Again, these statements are not supported by any evidentiary submissions. ScripSolutions has provided evidence, however, that Walgreens was reimbursed for 6,202,330 name brand prescriptions during the class period. *See* Colucci Declaration.

Eufaula Drugs has responded that there is no evidence that each brand name prescription was under-reimbursed and that if only half of the brand name prescriptions were under-reimbursed, the jurisdictional amount would not be met. Eufaula Drugs also states that ScripSolutions has presented no evidence that the value of any of its customer's damages exceeds $75,000.

This court agrees that ScripSolutions' statements, and its limited evidentiary support, are not sufficient to establish that Walgreens' recovery must be greater than that requested in the Amended and Restated Complaint and the jurisdictional amount. While ScripSolutions argues that the under-reimbursement must be at least two or three cents per prescription for Eufaula Drugs to have filed suit for anything less than a de minimus amount on its own behalf, there is nothing in the Complaint which indicates that this is Eufaula Drugs' position. The Amended and Restated Complaint states that, although ScripSolutions had access to AWP, ScripSolutions did not "fully reimburse" the pharmacies in the class. Amended and Restated Complaint at ¶ 12. There also is nothing in the Amended and Restated Complaint which states that the reimbursement amount was calculated in a uniform manner for all class members, or even for all prescriptions. If instead of two or three cents, the under-

reimbursement amount was one cent per prescription, using ScripSolutions' evidence that Walgreens was reimbursed for 6,202,330 name brand prescriptions during the class period, Walgreens would be entitled to approximately $62,000 in damages.[7] In addition, ScripSolutions has made no showing as to the amount of punitive damages which any plaintiff might be expected to recover. *Cf. Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 809 (11th Cir.2003) (past punitive damages awards in other cases not sufficient proof of jurisdictional amount under the preponderance of the evidence test). Therefore, the jurisdictional amount has not been established to a legal certainty.[8]

ScripSolutions also has contended that any gap between damages requested and the jurisdictional amount would be filled by sales which occur from the date of the Complaint to the judgment, but has provided no evidence of that amount. ScripSolutions further states that the gap between the amount claimed in the Amended and Restated Complaint and the

7. Or, as Eufaula Drugs states, if only half of the reimbursed prescriptions were under-reimbursed by two cents, then Walgreens' damages would also be less than $75,000.

8. Even applying a preponderance of the evidence test, there is no more reason to view the relief which will be afforded as being two or three cents per name brand prescription rather than one cent per prescription. Instead, one cent per prescription is consistent with limitation of damages pled by Eufaula Drugs and further is consistent with the policy behind Rule 23 class certifications which affords a feasible litigation avenue to plaintiffs with claims in small amounts. Whether the named Plaintiff's damages in this case have any bearing on its fitness as a class representative is not an issue before this court.

jurisdictional amount would be filled by interest on the award, but the diversity statute excludes consideration of interest, and ScripSolutions has not pointed to any reason why the interest in this case would be considered. *See* 28 U.S.C. § 1332; *cf. Insurance Co. of North America v. Keeling*, 360 F.2d 88, 92 (5th Cir.1966) (distinguishing a case in which interest assessed as a penalty was considered as part of the amount in controversy).

ScripSolutions argues finally, with respect to the injunctive relief requested, that if an injunction in favor of Walgreens increased reimbursement by only $.01 per prescription, the jurisdictional amount would be met. ScripSolutions states that Walgreens had over 570,000 brand name drug prescriptions in 2004, so that even $0.01 per prescription would be more than $500, if the plaintiff class received the injunctive relief requested.

For amount in controversy purposes, the value of injunctive or declaratory relief is the "value of the object of the litigation" measured from the plaintiff's perspective. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 218-20 (11th Cir.1997) (citations omitted). The value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted. *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1268 (11th Cir.2000). In evaluating the value of injunctive relief, a court must "insure that the benefits resulting from an injunction are not counted where they are so uncertain that the court cannot reasonably determine whether the amount of money placed in controversy by the present suit exceeds $75,000." *Id.* at 1268-69.

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The Amended and Restated Complaint does not seek $74,500 in damages plus injunctive relief, but instead includes all equitable relief and money damages in the $74,500 limitation. *See* Amended and Restated Complaint at ¶ 16. Therefore, the burden is on ScripSolutions to prove to a legal certainty that the amount in controversy based on all monetary and equitable relief sought exceeds $75,000.[9]

As already stated above, ScripSolutions has not demonstrated to a legal certainty that the money damages which could be afforded the plaintiffs exceeds the jurisdictional amount. ScripSolutions has further failed to demonstrate to a legal certainty that considering equitable relief along with the money damages amount exceeds $75,000.

ScripSolutions' argument regarding the value of any injunctive relief is based on the prescriptions reimbursed in the past. There is no evidence before the court, however, that Walgreens has a contract with ScripSolutions for reimbursement in the future, or that any other unnamed class member has such a contract. *Cf. Morrison*, 228 F.3d at 1269 (stating that the injunction has no reasonably certain monetary value to any individual class member because it is simply

9. ScripSolutions pointed out in the Notice of Removal that there is a request for a constructive trust for amounts by which ScripSolutions has been unjustly enriched, but ScripSolutions has not argued in response to the Motion to Remand that this request be treated in any manner other than an assessment of relief attributable to an individual plaintiff, nor presented any evidence as to the value of such relief. Accordingly, ScripSolutions has not met its burden of demonstrating that that relief would cause the requested relief to exceed $75,000 for any plaintiff.

impossible to know which class members will be involved in automobile accidents and assert claims for diminished value); *Friedman v. New York Life Ins. Co.*, 410 F.3d 1350, 1358 (11th Cir.2005) (where defendant argued that injunction would change future rate structure, the value of an injunction was speculative because the contractual relationship could be terminated). Further, the court has no evidence as to whether the number of prescriptions reimbursed in the past would be the same number in the future for Walgreens. In addition, with respect to Walgreens or any other unnamed class member, the court has no evidence as to the percentage of prescriptions which were under-reimbursed or the amount by which they were under-reimbursed, nor whether such amounts will remain the same. *Morrison*, 228 F.3d at 1269 (stating that the value of injunction is speculative where the amount of potentially diminished value insurance claims is uncertain); *see also Lutz v. Protective Life Ins. Co.*, 328 F.Supp.2d 1350, 1360 (S.D.Fla.2004) (finding that a statement as to the amount of premiums to be received in the future is speculative as to aggregate value "as it includes the total amount of premiums Defendant is scheduled to receive and not simply the amount of allegedly improper increases.").

The Plaintiff's attorney, an officer of the court, has expressly limited the claims of Eufaula Drugs and each class member to a total amount of $74,500 per plaintiff, including monetary and injunctive relief. This court is to give "great deference to such representations and presume them to be true." *Federated Mut. Ins. Co.*, 329 F.3d at 808. ScripSolutions has not shown to a legal certainty that any monetary recovery and injunctive relief in favor of Eufaula

Drugs, or any unnamed class member, must exceed $75,000. Therefore, given the legal certainty test required by *Burns*, and the admonition by the Eleventh Circuit that doubts as to the existence of jurisdiction are to be resolved in favor of remand, *Burns*, 31 F.3d at 1095, the court concludes that ScripSolutions has not established that diversity jurisdiction exists in this case, even assuming, without deciding, that an unnamed class member can, based on sufficient proof, provide the basis for diversity jurisdiction from which to exercise supplemental jurisdiction over the remainder of the class.

IV. CONCLUSION

For the reasons discussed above, this court lacks subject matter jurisdiction under either the Class Action Fairness Act or 28 U.S.C. § 1332. Therefore, the Motion to Remand is due to be GRANTED. A separate Order will be entered in accordance with this Memorandum Opinion.

DONE this 6th day of October, 2005.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

(WO)

CIVIL ACTION NO. 2:05cv370-A

EUFAULA DRUGS, INC.,

Plaintiff,

v.

SCRIPSOLUTIONS,

Defendant.

ORDER

In accordance with the Memorandum Opinion entered on this day, it is hereby ORDERED as follows:

(1) The Plaintiff's Motion to Remand (Doc. #9) is GRANTED and this cause is hereby REMANDED to the Circuit Court of Barbour County, Alabama (Eufaula Division).

(2) The clerk is DIRECTED to take all steps necessary to effect this remand.

(3) The Motion to Dismiss the Complaint or Transfer Venue filed by the Defendant, ScripSolutions, (Doc. #7) is left for disposition by the state court.

Appendix B

Done this the 6th day of October, 2005.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING FILED FEBRUARY 27, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15668-AA

EUFAULA DRUGS, INC., individually and on behalf of a class of all persons or entities throughout the United States who are similarly situated.

Plaintiff-Appellee,

versus

SCRIPSOLUTIONS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

BEFORE: ANDERSON, BIRCH and WILSON, Circuit Judges.

BY THE COURT:

Appellant's "Petition for Panel Rehearing" is DENIED.

APPENDIX D — CLASS ACTION FAIRNESS ACT

UNITED STATES PUBLIC LAWS
109th Congress - First Session
Convening January 7, 2005

PL 109-2 (S 5)
February 18, 2005
CLASS ACTION FAIRNESS ACT OF 2005

AN ACT To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

28 USCA § 1 NOTE

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2005".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Appendix D

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.

Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.

Sec. 9. Effective date.

28 USCA § 1711 NOTE

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

Appendix D

28 USCA prec. § 1711

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Coupon settlements.

"1713. Protection against loss by class members.

"1714. Protection against discrimination based on geographic location.

"1715. Notifications to appropriate Federal and State officials.

28 USCA § 1711

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.—The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under

rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.—The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(6) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

28 USCA § 1712

"§ 1712. Coupon settlements

"(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

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(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

"(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

"(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

"(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

"(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

"(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

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"(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

"(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

28 USCA § 1713

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

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28 USCA § 1714

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

28 USCA § 1715

"§ 1715. Notifications to appropriate Federal and State officials

"(a) DEFINITIONS.—

"(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term 'appropriate Federal official' means—

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

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"(2) APPROPRIATE STATE OFFICIAL.—In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

"(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

"(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding

company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION.—A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.—The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".

28 USCA prec. § 1651

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Action.....1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

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28 USCA § 1332

(1) by redesignating subsection (d) as subsection (e); and

28 USCA § 1332

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

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"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

"(A) whether the claims asserted involve matters of national or interstate interest;

"(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

"(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

"(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

"(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

"(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

"(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

"(A)(i) over a class action in which—

"(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

"(II) at least 1 defendant is a defendant—

"(aa) from whom significant relief is sought by members of the plaintiff class;

"(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

"(cc) who is a citizen of the State in which the action was originally filed; and

"(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

"(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

"(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

"(5) Paragraphs (2) through (4) shall not apply to any class action in which—

"(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

"(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or

amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

"(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

"(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

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"(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

"(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

"(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

"(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State

"(II) the claims are joined upon motion of a defendant;

"(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

"(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

"(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

"(ii) This subparagraph will not apply—

"(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

"(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

"(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.".

(b) CONFORMING AMENDMENTS.—

28 USCA § 1335

(1) Section 1335(a)(1) is amended by inserting "subsection (a) or (d) of" before "section 1332".

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28 USCA § 1603

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

28 USCA § 1453

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"(c) REVIEW OF REMAND ORDERS.—

"(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that

notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

"(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

"(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

"(A) all parties to the proceeding agree to such extension, for any period of time; or

"(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

"(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

"(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).".

28 USCA prec. § 1441

(b) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit

to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

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28 USCA § 2074 NOTE

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

28 USCA § 2071 NOTE

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

28 USCA § 1332 NOTE

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Approved February 18, 2005.

APPENDIX E — FEDERAL RULE OF CIVIL PROCEDURE 15(c)

Rule 15. Amended and Supplemental Pleadings

* * *

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies

the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

* * * *

APPENDIX F — ALABAMA RULE OF CIVIL PROCEDURE 15(c)

Rule 15. Amended and Supplemental Pleadings

* * *

(c) **Relation back** of amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) **relation back** is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, except as may be otherwise provided in Rule 13(c) for counterclaims maturing or acquired after pleading, or

(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party, or

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(4) **relation back** is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h).

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